COPY

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 67, Original

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

Counsel for Plaintiff

WAYNE L. KIDWELL
Attorney General
State of Idaho

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Boise, Idaho 83720

of counsel
MATTHEW J. MULLANEY, JR.

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Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Idaho, by its Attorney General, asks leave of the Court to file its complaint against the State of Oregon and the State of Washington submitted herewith.

MAR 2 8 1975

WAYNE L. KIDWELL
Counsel for Plaintiff

Statement in Support of Motion

Plaintiff, State of Idaho, asks this Honorable Court for leave to file the complaint in this action in order to protect the very existence of an extremely important natural resource and to obtain an equitable apportionment of that resource among the parties. The anadromous fish of the Columbia River Basin are produced in the waters of Washington, Oregon and Idaho both by natural and artificial methods. Anadromous fish

are migratory fish that spend a part of their life at sea, ascending rivers to spawn.

The Columbia River, the Snake River and their tributaries enjoy one of the longest runs of anadromous fish in the world, over 900 miles in length. The resource in Idaho is unique; Idaho does not border a saltwater body, yet the region that is now Idaho has enjoyed anadromous fish runs and spawning grounds throughout recorded history. Now the resource borders on extinction.

The Columbia, the Snake and their tributaries support anadromous species of shad, winter steelhead trout, "group A" and "group B" summer steelhead trout, (hereinafter "summer steelhead") summer chinook salmon, upriver and downriver spring chinook salmon, sockeye salmon, coho salmon, fall chinook salmon and chum salmon. Each type of anadromous fish, after leaving the ocean, will return to its own place of birth if it possibly can.

The State of Idaho at this time is primarily concerned with summer steelhead, summer chinook salmon, and upriver spring chinook salmon runs. These are the main types of anadromous fish which in the recent past have returned in great numbers to their spawning grounds in the State of Idaho to complete their life cycle.

Generally speaking, all anadromous fish have a similar life cycle. An anadromous fish is hatched from an egg and spends a period of time living in fresh water near the spawning grounds. After some growth the fish, referred to at this stage as a "smolt", migrates downstream in the Columbia River system from fresh water tributaries such as the Salmon, Clearwater and Snake Rivers in Idaho eventually to enter the Pacific

Ocean at the mouth of the Columbia River. The starting time and the length of time necessary to complete the run is variable for each species and each spawning area.

Once an anadromous fish reaches the Pacific Ocean it spends from one full year to four years living and maturing in the salt water. At appropriate times anadromous fish form large schools based on race, species and spawning ground destination and then begin the tedious upstream battle to return to the spawning grounds where they were hatched. An anadromous fish has sensitive navigational capabilities that allow it to return to the same spawning stream from which it came.

After a difficult upriver trip of up to 900 miles, during which the fish does not eat, the survivors spawn and in most instances die following the spawning act. The cycle begins again when young anadromous fish hatch from the eggs.

The salmon and steelhead face tremendous obstacles on their upstream run. Immediately upon reentering fresh water at the mouth of the Columbia they can be subjected to intense commercial fishing pressures which are regulated by the Oregon-Washington Columbia River Fish Compact which is controlled exclusively by Washington and Oregon. The fish must pass through five commercial fishing zones where they may be caught in huge numbers by commercial fishermen utilizing gill nets. Some fish are also caught in these zones by sport fishermen. The migrating fish are also required to surmount obstacles presented by hydroelectric dams along the Columbia River and its tributaries. After passing over Bonneville Dam, the first dam in their path, the fish enter Zone 6, an Indian commercial

fishing zone, where they are once again subject to intense fishing pressure. Sport fishing during the proper seasons is allowed on the full length of the Columbia. The fish destined for Idaho that survive all of these dangers finally enter Idaho waters at Lewiston and eventually reach their spawning grounds.

The fish destined to spawn in Idaho can only reproduce their own kind if they reach their spawning grounds. It is not the number of fish that reach the ocean, but the number of healthy fish that are allowed to make the final "escapement" over the last dam in Washington on the Snake River into Idaho that will determine the size of the next "crop" of anadromous fish. Enough steelhead and salmon must be allowed to escape into the State of Idaho to reach their native spawning grounds in sufficient numbers to guarantee not only the continuation of the species but also to provide a large downstream run of "smolts" to the sea. Commercial fishermen do not have an impact on the *downstream* migration.

Anadromous fish are killed in large numbers as a result of dams on the migratory path, slackwater caused by the dams, polluted water and intense commercial fishing pressure. Commercial fishing is not the only problem they face, but it is one factor that man can control *now* before the runs are destroyed or irreparably harmed. Once the continuation of the species is guaranteed by reasonably regulating commercial fishing, the other problems can be alleviated but that will involve a considerable amount of time to complete, at considerable expense.

The complex factual pattern surrounding the anadromous fish problem makes it at once evident that efficient and intelligent management and regu-

lation of commercial fishing is mandatory. It is the contention of the State of Idaho that, in order to properly manage and regulate the resource, all states that have a direct interest in the runs and which have major spawning grounds and hatcheries must be involved in the decision-making process.

Presently anadromous fishing on the Columbia River is controlled through the joint efforts of the State of Washington and the State of Oregon, to the exclusion of the State of Idaho. The Oregon-Washington Columbia River Fish Compact was approved by the legislatures of Washington and Oregon in 1915 and ratified by the Congress of the United States in 1918. The Columbia River Fish Compact regulates the commercial harvest of anadromous fish migrating up the Columbia River. The Columbia River forms a part of the common boundary between Washington and Oregon. Defendants are represented in the Compact by the Fish Commission of Oregon with three members who together have one vote, and the director of the Washington Department of Fisheries who casts one vote. The State of Idaho is not a member of the Compact and has no vote in the policy and rule making which greatly affect the anadromous fish produced in, and destined to return to, Idaho.

The Compact meets to consider the prospective size of any given run of fish based on evidence presented by its staff and other interested parties, including Idaho. The Compact then promulgates regulations mandating the length of the fishing seasons, the types of gear that may be used, the types of fish that may be taken, and the areas open to fishing. The regulations are then implemented by the states and are the "law" of commercial fishing on the portion of the Columbia

River which forms a part of the mutual boundary of Washington and Oregon. Since Idaho has no vote in setting the commercial fishing regulations on the Columbia River, there is no way to insure sufficient escapement to the Idaho spawning grounds. If commercial fishing interests from outside of Idaho continue to set commercial fishing regulations, the inherent greed in man may totally destroy the anadromous fish runs. Not only will the State of Idaho suffer irreparable harm, but if the runs are destroyed, commercial fishing as well as sport fishing will be a thing of the past.

As a result of the inequitable composition of the Compact, the fate of the fish produced in Idaho ultimately resides in the hands of representatives from the States of Oregon and Washington. In order to maximize the short range economic benefits to the citizens of Oregon and Washington, the Compact has extended fishing seasons and authorized the use of fishing techniques and apparatus which have degraded and could eventually destroy the anadromous fish runs for Idaho and everyone.

Plaintiff, State of Idaho, by its complaint, seeks an equitable apportionment of the anadromous fish in the Columbia River Basin drainage commensurate with the production of fish within the State of Idaho boundaries. Not only is the State of Idaho the natural spawning ground for many species of fish but it also produces, in ever increasing numbers, hatchery fish which are allowed to migrate in the normal pattern to the sea. These hatchery fish will eventually return to Idaho waters if allowed. The State of Idaho has maintained a continuing effort to increase the supply of hatchery fish in order to maintain the "escapement" levels into Idaho waters for the benefit of its sport fisheries and

tourists and to preserve the aesthetic and spiritual values inherent in the runs. However, once these fish migrate into the states of Oregon and Washington they come under the control of Washington and Oregon and in particular the Columbia River Fish Compact, commercial fishing agencies.

It is also economically impractical for the State of Idaho and others to continue indefinitely to invest huge sums of money in the production of hatchery fish simply to turn them loose into the drainage and allow them to become money in the pockets of commercial fishermen from Washington and Oregon.

The State of Idaho also seeks an equitable apportionment of the fish runs so that Idaho may be guaranteed a certain "escapement" figure which will insure the continued existence and well being of all of the species spawning within the State of Idaho and which will also insure a reasonable sport fishery for the State of Idaho.

The State of Idaho has been forced in past years to close its sport fisheries before a reasonable sport fishing season had elapsed. This was because of the limited number of fish returning to Idaho due to the effects of dams and overfishing in the Columbia River. Not only does such overfishing diminish the available sport fisheries within the State of Idaho but it, in fact, endangers the perpetuation of the fish populations.

Between the years 1962 and 1974, Idaho produced 56% of all of the upriver spring chinook entering the Columbia River system, but less than 16 of every one hundred spring chinook entering the Columbia on the return migration found their way to Idaho waters. Likewise, for the same period, 55% of the upriver

summer steelhead entering the Columbia River system were produced in Idaho but only 23% of that run were able to return to Idaho's waters. In the last several years the summer chinook salmon runs entering Idaho have declined so drastically in numbers that no fishing has been permitted on that race of fish in Idaho since 1965.

Further, in 1974-75, the summer steelhead sport fishing season in Idaho was severely curtailed because of depleted runs and Idaho faces great danger of severe curtailment again in 1975-76.

Idaho rears anadromous fish at eleven hatcheries within the state and together with cooperating federal agencies and others, Idaho spent $1,061,083.00 on fish production in 1974. $105,000.00 were spent on research and $123,352.00 were spent for operation and maintenance of fish screens and fishways. 9,330,300 spring chinook salmon were "planted" in Idaho in 1974 as were 330,037 summer chinook and nearly 7 million summer steelhead.

As can be seen, Idaho contributes a great deal to the anadromous fish runs of the Columbia River system through natural and hatchery production. If these fish continue to be taken in excess by Oregon and Washington commercial fishermen and are not allowed to return to spawn, their numbers will be reduced in the near future and their extinction is entirely possible. For these reasons it is absolutely mandatory that Idaho be made a member of the Columbia River Fish Compact and be allowed to vote on all issues affecting the number of fish which will escape into Idaho waters for spawning. Idaho is also entitled to a reasonable sport fishery.

Any mandate that Idaho be accorded a vote within

the compact would be of some assistance. The State of Idaho would have a vote but in most cases where the commercial interests of the States of Washington and Oregon were involved, the vote would likely be two to one in favor of the Oregon and Washington commercial interests. For this reason, it is also necessary that this Honorable Court apportion the resource by an equitable formula that will assure Idaho a run of anadromous fish each year to continue the species and to provide Idaho, the state producing these fish, with a reasonable sport fishery.

The State of Idaho can, with reasonable certainty, estimate the number of fish which must reach Idaho in order to assure a reasonable sport fishery season and the continuation and well-being of the species. These "escapement figures" can be presented for each species.

This Honorable Court has accepted jurisdiction in suits dealing with boundary disputes between two or more states. *Louisiana* v. *Mississippi*, 202 U.S. 1 (1906); *Nebraska* v. *Iowa*, 406 U.S. 117 (1972); *Ohio* v. *Kentucky*, 410 U.S. 641 (1973); and *Vermont* v. *New York*, ___ U.S. ___, 94 S.Ct. 2248, 41 L.Ed. 2d 61 (1974). Cases involving the manner of use of, and rights in, interstate streams have been heard by the Court. *Kansas* v. *Colorado*, 185 U.S. 175 (1902); *Kansas* v. *Colorado*, 206 U.S. 46 (1907); *Wyoming* v. *Colorado*, 259 U.S. 419 (1922); and *Wisconsin* v. *Illinois*, 281 U.S. 696 (1930), *petition for modification*, 309 U.S. 569 (1940). The Court has also exercised its jurisdiction to enjoin enforcement of a law of one state which would allegedly injure the interstate commerce and welfare of the complaining state. *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923).

None of the cases previously heard by the Court under the jurisdiction of 28 U.S.C. § 1251 (a) (1) are directly in point with Plaintiff's action. It is true, however, that in the water cases, this Court has apportioned a limited and exhaustable natural resource between states claiming a right in the resource. As in the water cases, the anadromous fish of the Pacific northwest are a product of Idaho, Washington and Oregon. Further, the waters in which they live and migrate are interstate waters. Therefore, it is Plaintiff's contention that the issues presented by this case are cognizable by this Court since the action seeks an equitable apportionment of a finite natural resource in which Plaintiff, as well as Defendants, claim a right. Because Idaho lies upstream from defendants, it is being denied its right in the resource and this inequity can only be remedied if this Court accepts jurisdiction in the action and equitably apportions the resource.

There is an anadromous fish cycle like the hydrologic cycle of precipitation, surface and ground waters, evaporation and transpiration, a part of which the Court has considered and apportioned in the cases dealing with interstate streams. Unlike the water cases, however, the State of Idaho provides and maintains the prime spawning grounds for many of these fish and a great number of fish are also produced in Idaho hatcheries at a substantial expense to the state and its citizens. It is submitted that the entitlement to an equitable portion of these fish is stronger than an entitlement to water merely flowing through a state. These fish are created within the boundaries of the State of Idaho and are predestined to return to Idaho if not interfered with by man.

Further, unlike the water cases, the instant matter

is much more urgent. The flow of the water in the stream does not rapidly disappear or die off in an irreversible manner. However, in the case of the anadromous fish, continued abuse of the runs without adequate management may in fact destroy a resource which is valuable not only to the State of Idaho but extremely valuable to the States of Washington and Oregon and to this nation.

In *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), this Court was asked to enjoin enforcement of a West Virginia law which allegedly interfered with the interstate commerce and the public welfare of Pennsylvania. Plaintiff, State of Idaho, contends in this action that, by refusing to pass corrective legislation and by enforcing existing laws and regulations in such a way as to threaten the continuation of the anadromous runs and to deny an equitable share of the runs to Idaho, Defendants are interfering with the interstate commerce of Idaho and doing irreparable harm to the state and its citizens.

The problem is an intensely complex one that must be solved immediately. The State of Idaho has attempted to become a voting member of the Compact, but has been rejected by the States of Washington and Oregon. The problem is immediate; the damage irreparable, not only to the State of Idaho but to the States of Washington and Oregon and the entire United States. Plaintiff asserts its rights in this original action to preserve a magnificent, irreplaceable natural resource.

Plaintiff's Complaint presents a "justiciable case or controversy" which is cognizable by this Court. The State of Idaho brings this action in its sovereign capacity for the benefit of the State and not on behalf of any private interest. If jurisdiction is not noted and

proper relief granted as requested, the State of Idaho will suffer immediate and irreparable harm, damage and injury of a substantial magnitude.

Should jurisdiction not be accepted, the State of Idaho will be left without a remedy since this Court's jurisdiction is "original and *exclusive*" in suits between states. [28 U.S.C. § 1251 (a) (1)]. If jurisdiction is not accepted the resource will be in danger of extinction and the economic, recreational, aesthetic and spiritual values of this irreplaceable resource will be lost to all.

Therefore, the State of Idaho respectfully requests that this Court accept original jurisdiction and order that the State of Idaho be made a voting member of the Compact so that wise regulation of the resource may be instituted, thereby guaranteeing the continuation of the species for the highest benefit of all concerned.

Further, the State of Idaho respectfully requests that the Court determine an equitable apportionment of the anadromous fish runs in the Columbia River and the Snake River and their tributaries based on the number of fish produced and contributed to the total fishery by each state, the present and foreseeable future needs of a viable sport fishery in Idaho, and additional escapement sufficient to assure continuation of the species and restoration of the anadromous fish runs to a size previously enjoyed in the Columbia River Basin.

DATED This 28th day of March, 1975.

Respectfully submitted,

Wayne L. Kidwell

WAYNE L. KIDWELL
Attorney General

TERRY E. COFFIN
Deputy Attorney General
State of Idaho

MATTHEW J. MULLANEY, JR.
of counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No._____, Original

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON

Defendants.

COMPLAINT

COMES NOW The Plaintiff, State of Idaho, and complains and alleges as follows:

I

Plaintiff, State of Idaho, is a sovereign state of the union of the United States of America, admitted on an equal footing with the original states in all respects whatever on July 3, 1890 pursuant to 26 Stat. L. 215 ch. 656, Idaho Admission Bill, § 1.

II

Cecil D. Andrus is the duly elected Governor of the State of Idaho; Wayne L. Kidwell is the duly elected Attorney General of the State of Idaho; and Joseph C. Greenley is the Director of the Idaho Department of Fish and Game.

III

Defendant State of Washington is a sovereign state of the union of the United States of America.

IV

Defendant State of Oregon is a sovereign state of the union of the United States of America.

V

The jurisdiction of this Honorable Court in this matter lies in § 1251 (a) (1), Title 28, *United States Code*, which provides that the "Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more states;".

VI

The States of Idaho, Washington and Oregon occupy the major portion of the Columbia River Basin and share a substantial anadromous fishery wherein fish spawn, hatch, and grow to juvenile or "smolt" size in fresh water tributaries of the Columbia and Snake River, migrate downstream to the Pacific Ocean through the Columbia Basin drainage and mature at sea for one, two, three or four years depending on the species, and then reenter fresh water at the mouth of the Columbia River intent upon returning to their own spawning ground, there to spawn and maintain the species.

VII

Anadromous fish destined for waters of the State of Idaho must migrate upstream in the Columbia River where it forms the common boundary between Defendants Washington and Oregon to the intersection of the Columbia River and 46° latitude, thence in the Columbia River as it flows through the State of

Washington to the confluence of the Snake River, thence upstream in the Snake River to a point opposite the mouth of the Clearwater River at Clarkston, Washington—Lewiston, Idaho, thence continuing upstream in the Snake River to its tributaries, including the Clearwater River, to spawn.

VIII

The anadromous fishery in the Columbia River Basin includes winter steelhead trout, downriver spring chinook salmon, upriver spring chinook, summer chinook, group "A" summer steelhead, group "B" summer steelhead, sockeye salmon, shad, coho salmon, fall chinook and chum.

IX

The Idaho anadromous fishery is made up principally of upriver spring chinook salmon, summer chinook salmon and group "A" and "B" summer steelhead trout (hereinafter "summer steelhead"). Fall chinook salmon and sockeye salmon were formerly abundant in Idaho waters, but now are present only in small numbers insufficient to support a fishery.

X

Benefits to Idaho have been substantially below an equitable level in comparison to its production of fish. Between 1962 and 1974, Idaho produced 56% of all of the upriver adult spring chinook run entering the Columbia River Basin, but less than 16% of upriver spring chinook entering the Columbia on the spawning migration escaped into Idaho waters. For the same period, Idaho produced 55% of the upriver adult summer steelhead run entering the Basin but only 23% of that run escaped back into Idaho waters. The reentry of adult summer chinook into Idaho waters has declined

so substantially that no fishing on this race of fish has been permitted in Idaho since 1965.

XI

Because of depletion of the Idaho anadromous fishery, the summer steelhead season in 1974-75 was severely curtailed and curtailment is likely again for the 1975-76 season. A declining juvenile migration to the sea in 1973 makes it probable that the upriver spring chinook season will be curtailed in Idaho this year. Sport fishing on adult summer chinook has been closed in Idaho since 1965 in an attempt to preserve this race of fish.

XII

To regulate the anadromous fishery common to Washington and Oregon, Defendants formed the Oregon-Washington Columbia River Fish Compact in 1915. The Compact was approved by the Congress of the United States on April 8, 1918, 40 Stat. 515, and provides:

> All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both States.

XIII

Within the Compact, Washington is represented by its Department of Fisheries. Oregon is represented by its Fish Commission. Defendants' sport fishery agen-

cies, the Oregon Wildlife Commission and the Washington Department of Game, are not a part of the Compact. Regulations are agreed upon by Defendants' commercial fishery agencies at Compact meetings, whereupon each Defendant state independently institutes the agreed to regulations. Defendants regulate their sport fishing independent of the Compact.

XIV

Defendants' management and regulation of the commercial fishery have failed to recognize and make provisions for escapement of an equitable portion of anadromous fish into the State of Idaho, thereby denying Plaintiff its entitlement to an equitable portion of the Columbia River Basin anadromous fishery and endangering the anadromous fishery in Idaho, all to the substantial and irreparable harm of the Plaintiff and all of its citizens.

XV

Because of the depleted runs of anadromous fish within the State of Idaho, Plaintiff has been forced to reduce the length of its anadromous fish seasons and has also been forced to reduce the catch limits during its sport fishery season over the last five years in a drastic manner.

XVI

Plaintiff has on various occasions sought admission to the Oregon-Washington Columbia River Fish Compact in an effort to assert and protect its rights to a sustained anadromous fishery, but admission has been and continues to be denied by the Defendants.

XVII

Anadromous fish are reared at eleven hatcheries

within the State of Idaho. These fish hatcheries are variously supported by the State of Idaho Department of Fish and Game, the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Army Corps of Engineers and Idaho Power Company, a public utility operating within the State of Idaho. In fiscal year 1974, $1,061,083.00 were expended in Idaho on hatchery work per se, i.e., anadromous fish production. Another $105,000.00 were spent in the State of Idaho to conduct investigations, management studies and experimental hatchery productions within the State of Idaho. $123,352.00 were spent in the State of Idaho for operation and maintenance of fish screens and fishways. These figures are over and above ordinary management and administrative costs.

XVIII

In 1974 alone, 9,330,300 spring chinook salmon, 330,037 summer chinook and 6,942,023 summer steelhead were stocked in Idaho waters. In 1973, 8,237,396 spring chinook were planted in Idaho, as were 217,100 summer chinook, and 12,986,027 summer steelhead. These plantings consisted of smolts and fingerling fish as well as the planting of fertilized eggs in spawning beds.

XIX

Hatchery production within the State of Idaho is and has been a necessary supplement to the natural spawn of anadromous fish whose numbers have been badly diminished. Despite the natural spawn and hatchery production within the State of Idaho, the return runs of all anadromous fish are steadily declining.

XX

Idaho has no commercial fishing for anadromous

fish within the State of Idaho but does maintain an anadromous sport fishery which Idaho residents and tourists utilize for recreational pleasure and the spiritual and aesthetic values inherent in the runs.

XXI

Defendants have failed and refused to provide effective management and regulation of commercial and sport adult anadromous fishing in Oregon and Washington. Defendants have failed and refused to recognize and protect Idaho's interest in the anadromous fisheries of the Columbia River Basin and have instead adopted and implemented management and regulatory practices concerning commercial fishing which have a substantial and injurious effect upon upstream anadromous sport fishing in Idaho and which deny Plaintiff an equitable share of the resource commensurate with its production of anadromous fish.

XXII

Unless Idaho receives an equitable portion of anadromous fish returning from the sea, Idaho will be forced to shorten further or eliminate entirely its anadromous sport fishing seasons in the future. Unless sufficient numbers of fish in each anadromous fish run are allowed to return to their native spawning grounds, the anadromous fish runs may disappear entirely.

XXIII

Unless the State of Idaho is afforded its equitable share of anadromous fish runs it will suffer irreparable harm in that its anadromous sport fishery will be depleted or erradicated; its tourist industry will be irreparably damaged and harmed; and the spiritual and aesthetic values of the runs themselves will be lost,

all to the irreparable damage and harm of the State of Idaho, its citizens and the citizens of the United States in general.

WHEREFORE, Plaintiff prays as follows:

1. That this Honorable Court accept and assume jurisdiction of this case;

2. That the Court declare and affirm that Plaintiff is entitled to an equitable portion of the upriver anadromous fishery of the Columbia River Basin and that the Court determine Plaintiff's equitable portion based on the evidence;

3. That the Court require and order Defendants and each of them, and their officers, agents and employees, to admit Plaintiff, State of Idaho, as a voting member to the Columbia River Fish Compact;

4. That the Court require and order Defendants and each of them, and their officers, agents and employees, to alter the management techniques and regulation of the commercial and sport anadromous fishery in the States of Oregon and Washington in order to recognize and protect Idaho's interest in the upstream anadromous fishery of the Columbia River Basin;

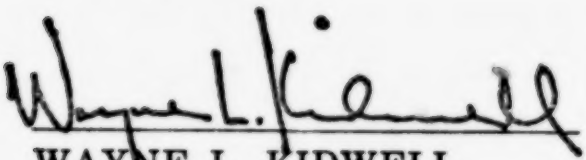
5. That the Court retain jurisdiction of this cause pending administration of the rights of the parties under the Columbia River Fish Compact;

6. That the court award Plaintiff its costs in this action;

7. For such other and further relief as this Court may deem proper and necessary.

DATED This 28th day of March, 1975.

WAYNE L. KIDWELL
Attorney General



WAYNE L. KIDWELL

TERRY E. COFFIN
Deputy Attorney General
State of Idaho
Counsel for Plaintiff

MATTHEW J. MULLANEY, JR.
of counsel

STATE OF IDAHO
County of Ada } ss.

CECIL D. ANDRUS, Being first duly sworn, deposes and says:

THAT He is the Governor of the State of Idaho, that he has read the above and foregoing Complaint, knows the contents thereof, and believes the same to be true.

Cecil D. Andrus

CECIL D. ANDRUS, Governor
State of Idaho

SUBSCRIBED AND Sworn to before me this 27th day of March, 1975.

NOTARY

NOTARY PUBLIC for Idaho
Residing at Boise, Idaho

STATE OF IDAHO
County of Ada } ss.

JOSEPH C. GREENLEY, Being first duly sworn, deposes and says:

THAT He is the Director of the Idaho Department of Fish and Game, that he has read the above and foregoing Complaint, knows the contents thereof, and believes the same to be true.

COPY Original Signed by Joseph C. Greenley Director

JOSEPH C. GREENLEY, Director
Department of Fish and Game

SUBSCRIBED AND Sworn to before me this 25th day of March, 1975.

NOTARY

NOTARY PUBLIC for Idaho
Residing at Boise, Idaho

PROOF OF SERVICE

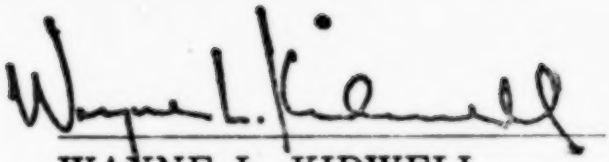
I, WAYNE L. KIDWELL, Attorney General, State of Idaho, attorney for Plaintiff herein, State of Idaho, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 28th day of March, 1975, I served three copies of the foregoing Motion For Leave To File Complaint, Statement In Support of Motion For Leave To File Complaint and Complaint in the above entitled matter pursuant to Supreme Court Rule 33, on all parties required to be served by Supreme Court Rule 9 (3), by mailing the same in a duly addressed envelope, with airmail postage prepaid to:

1. Honorable Daniel J. Evans, Governor of the State of Washington, State Capitol, Olympia, Washington, 98104.

2. Honorable Slade Gorton, Attorney General of the State of Washington, Temple of Justice, Olympia, Washington, 98501.

3. Honorable Robert Straub, Governor of the State of Oregon, State Capitol, Salem, Oregon, 97310.

4. Honorable R. Lee Johnson, Attorney General of Oregon, 100 State Office Building, Salem, Oregon, 97310.



WAYNE L. KIDWELL
Attorney for Plaintiff
State of Idaho 83720

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 67, Original

STATE OF IDAHO, ex rel. CECIL D. ANDRUS, Governor, WAYNE L. KIDWELL, Attorney General, and JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

v.

STATE OF OREGON and STATE OF WASHINGTON,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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Plaintiff,

v.

STATE OF OREGON and STATE OF WASHINGTON,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

This is not an appropriate case for the exercise of this Court's original jurisdiction. Not only should the issues presented by this case be determined initially by the Congress, but also this petition raises complicated questions of fact which cannot easily be resolved by an appellate court without placing an undue burden on the Court's regular schedule. Moreover, recent legislation enacted by the State of Oregon makes the grievances set forth in Idaho's petition moot, at least with respect to Oregon.

The Columbia River and its tributary, the Snake River, are now commercially navigable from the Pacific Ocean as far inland as Lewiston, Idaho. This river system has always been a major channel of interstate commerce, and it is both the prerogative and the responsibility of the Congress to enact such regulations governing the use of the river and its resources as Congress may deem appropriate.

Additionally, Article I, Section 10, clause 3, of the Constitution of the United States requires Congressional approval of any compact or agreement between the States. Idaho is thus asking this Court to dictate the terms of a compact having the force of law and then send it to Congress for approval. This does not really fall within the scope of this Court's judicial power pursuant to Article III of the Constitution, and it is questionable whether this Court is constitutionally authorized to fashion the legislative remedy sought by Idaho.

In any event, Congress is the proper forum wherein Idaho should seek relief in the first instance. As this Court pointed out in *United States v. Nevada*, 412 U.S. 534, 538 (1973):

> "We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim. *Illinois v. City of Milwaukie*, 406 U.S. 91 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Massachusetts v. Missouri*, 308 U.S. 1 (1939)."

Idaho complains on page 12 of its petition that if this Court does not assume jurisdiction of this case, Idaho

will be left without a remedy, because 28 U.S.C. § 1251(a)(1) makes this Court's jurisdiction *exclusive* in suits between states. However, this Court has construed that statute more liberally, holding in *Illinois v. City of Milwaukie*, 406 U.S. 91, 93 (1972), that:

> "It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly,' *Utah v. United States*, 394 U.S. 89, 95. We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases."

Noting that "appropriateness" involves the availability of another forum wherein relief may be had, this Court went on to discuss its reluctance to assume original jurisdiction in most cases, even where such jurisdiction may clearly exist, supra, 93-94:

> "We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer. *Washington v. General Motors*, 406 U.S. 109."

Likewise, in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), a dispute between the State of Ohio and various major corporations located in other states and in Canada, involving the pollution of Lake Erie, this Court refused to assume the jurisdiction it specifically found existant. The Court discussed at length the difficulty of fact finding by an appellate court, and the probability that the matter might be better resolved by means other than a trial to the Court. In refusing to assume jurisdiction, the Court noted, supra, at 497:

> ". . . changes in the American legal system and the

> development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction."

and again, at 499:

> "What gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court."

The adjudication of Idaho's claim will involve innumerable disputed questions of fact concerning the numbers of fish, the various reasons for their alleged decline, and the optimum allocation of the remaining fish amongst the States. This Court is aware of the potential administrative and evidentiary problems this poses, as noted in *Ohio v. Wyandotte*, supra, at 498:

> "This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of fact-finding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence."

Moreover, the problem can probably best be resolved in a non-judicial setting. The futility of attempting to determine such complex technical and political matters in court was well put in *New York v. New Jersey*, 256 U.S. 296, 313 (1921):

> "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem

> of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

Indeed, in the 50 years since that decision was rendered, this Court has tended increasingly to require litigants seeking to invoke this Court's original jurisdiction to settle their differences by other means. For example, in *Vermont v. New York*, 417 U.S. 270 (1974), this Court refused to approve the proposed settlement of a dispute between the two states involving pollution in Lake Champlain, noting that the parties had other and more appropriate means of reaching the desired results, such as an interstate compact under Article I, Section 10, clause 3, or through a settlement based upon agreement of the parties, which might be the basis for a motion to dismiss the complaint. The same philosophy is equally applicable to the allocation of a diminishing natural resource amongst the three States and numerous Indian tribes which compete for the anadromous fish in the Columbia River system.

In any event, the issues raised by Idaho's petition are, or soon will be moot as concerns the State of Oregon. The Oregon Legislature has passed Senate Bill 373,[1] set forth herein as Appendix A, which provides for the admission of Idaho to the interstate compact. As this Court

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[1] At this writing [June 23, 1975], the bill in question has not yet been signed by the Governor.

so wisely noted in *Sears v. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419*, 397 U.S. 655, 657 (1970):

> " 'To adjudicate a cause which no longer exists exists is a proceeding which this Court uniformly has declined to entertain.' *Oil Workers Union v. Missouri*, 361 U.S. 363, 371, quoting from *Brownlow v. Schwartz*, 261 U.S. 216, 217-218. See also *Hall v. Beals*, 396 U.S. 45, *Brockington v. Rhodes*, 396 U.S. 41, *Golden v. Zwickler*, 394 U.S. 103."

Accord: *Los Angeles Herald Examiner v. Kennedy*, 400 U.S. 3 (1970). It is thus obvious that as far as Idaho's admission to the interstate compact is concerned, the matter is, or soon may be moot.

We think it is equally apparent that the other issues raised by Idaho's petition can be better solved by Congress, by agreement among the parties, or by virtually any means other than adjudication by this Court.

Respectfully submitted,

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July 1975

APPENDIX A

Oregon Laws 1975, ch. ——— (Senate Bill 373)

AN ACT

Relating to the Columbia River Compact; creating new provisions; amending ORS 506.045; repealing ORS 507.020 and 507.030; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this Act is added to and made a part of ORS chapter 507.

SECTION 2. If the Congress of the United States by virtue of the authority vested in it under the Constitution of the United States, providing for compacts and agreements between the states, ratifies the following as a definite compact between the states of Idaho, Oregon and Washington, there shall exist between the states of Idaho, Oregon and Washington, upon ratification by Idaho and Washington, a compact and agreement, the purport of which shall be substantially as follows:

The compact states acknowledge that they have a common interest in the conservation and management of anadromous fish stocks in the Columbia River drainage and they mutually agree to assume joint responsibility in developing commercial and sports fisheries programs which will recognize and give consideration to the interests of all users of the resource.

Membership from the compact states shall be the Idaho Fish and Game Department, the Oregon State Fish

and Wildlife Commission, the Washington Department of Fisheries and the Washington Department of Game.

All rules and regulations for the conservation and management of anadromous fish in the waters of the main stem of the Columbia River from its mouth to the mouth of the Snake River and the waters of the main stem of the Snake River from its mouth to the headwaters of both the Clearwater and the Salmon Rivers, shall be made, changed, altered and amended in whole or in part by majority vote of the states. In voting on rules and regulations, each state is entitled to one vote. Idaho shall vote only on those rules or regulations which relate to steelhead trout, spring chinook salmon and summer chinook salmon.

The individual states shall be responsible for the management of anadromous fish stocks in pertinent tributary streams and shall be guided in such management by the intent and purpose of this compact.

SECTION 3. ORS 506.045 is amended to read:

506.045. There are excluded from the operation of ORS 506.136 to 506.151, [*507.030,*] 508.025, 508.285, subsection (1) of 500.025, ORS 509.206, [*and*] 509.216 **and section 2 of this 1975 Act and rules and regulations adopted pursuant thereto,** any Warm Springs, Umatilla, Yakima, Wasco, Tenino, Wyum and other Columbia River Indians affiliated with these tribes and entitled to enjoy fishing rights, who have not severed their tribal relations, in so far as it would conflict with any rights or

privileges [*granted to*] **reserved by** such Indians under the terms of the treaties made by the United States with the Warm Springs Indians on June 25, 1855, and with the Umatilla and Yakima Indians on June 9, 1855.

SECTION 4. ORS 507.010, 507.020 and 507.030 are repealed.

SECTION 5. Sections 3 and 4 of this Act take effect on the effective date of the compact provided in section 2 of this Act.

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v.

STATE OF OREGON, STATE OF WASHINGTON, *Defendants.*

STATE OF WASHINGTON'S BRIEF IN OPPOSITION TO STATE OF IDAHO'S MOTION TO FILE A COMPLAINT

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STATE OF OREGON, STATE OF WASHINGTON, *Defendants.*

STATE OF WASHINGTON'S BRIEF IN OPPOSITION TO STATE OF IDAHO'S MOTION TO FILE A COMPLAINT

The State of Washington by its Attorney General respectfully requests that the Court deny the application of the State of Idaho to file an original action in this Court against the states of Washington and Oregon.

STATEMENT IN OPPOSITION TO THE MOTION

The State of Idaho has requested permission to file a complaint in this Court seeking:

(1) Admission to the Oregon-Washington Columbia River Fish Compact which was ratified by Congress in 1918 (40 Stat. 515) (set forth in Appendix 1).

(2) The Court to establish what Idaho calls an "equitable portion" of the anadromous fish runs in the Columbia River to be preserved for the State of Idaho and its citizens.

We respectfully submit that there is no basis for granting the relief requested by the State of Idaho. This Court on a number of occasions involving original suits by states in this Court has stated:

> "The burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921); also see, *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); and *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

The Columbia River System encompasses the states of Washington, Oregon, Idaho and the Cana-

dian province of British Columbia. Throughout most of this river system anadromous fish are produced and these fish spawn in fresh water and migrate as juveniles to the Pacific Ocean. After varying periods of time, the fish which have survived the outward migration and the salt-water environment reenter the Columbia River and try to return to their original spawning areas which are on tributaries and the main stream of the river throughout the Columbia River System. One of the major tributaries of the Columbia River is the Snake River, which originates in the State of Idaho. This river forms the border between the states of Washington and Idaho for approximately thirty miles. It then proceeds through the State of Washington for nearly 140 miles, flowing into the Columbia River, which at that point is nearly 300 miles from the Pacific Ocean. The Columbia River then forms the border between the states of Washington and Oregon for approximately 270 miles, extending to the Pacific Ocean. The concerns and contentions expressed by the State of Idaho relate to this lower portion of the Columbia River and the Snake River and the anadromous fish populating the same.

The states of Washington and Oregon have been exercising effective management control for a number of years with reference to the harvesting and conservation of anadromous fish runs in the Columbia River. In 1915 the Washington legislature (§ 116, chapter 31, Laws of 1915) and the Oregon

legislature (§ 20, chapter 188, Laws of 1915) authorized the creation of the Oregon-Washington Columbia River Fish Compact contingent upon approval by Congress pursuant to Article I, § 10 of the United States Constitution. Congress in 1918 (40 Stat. 515) approved and ratified the Compact. Idaho is now seeking by its proposed complaint to become a member of the Oregon-Washington Columbia River Compact. The Governor of the State of Washington by an executive request (House Bill 156, quoted in Appendix 2) has sought legislative approval for the addition of the State of Idaho to the Oregon-Washington Compact. The bill passed the Washington House of Representatives 93-5 and was recommended for final passage by the Senate committee. However, the legislature ended before the Senate approved the bill. A compact under the United States Constitution, Article I, § 10, clearly requires the consent of the states and Congress. The judicial relief being sought by Idaho is an attempt to compel consent not only from the states of Washington and Oregon but also from the United States Congress, which is not named or proposed as a party in this action. The failure to join the United States is significant in light of this Court's dismissal of *Arizona v. California*, 298 U.S. 558, 571 (1936), because the United States, which was a necessary party, had not been included as a party.

At the time this brief was prepared the states of Washington and Oregon through the Compact have

closed the entire Columbia River below the conflux with the Snake River, and the Snake River within the State of Washington to fishing by either commercial or sports fishermen. The total closure is an effort to protect spawning stock so that the fish runs will have the opportunity to naturally replenish and continue in the future. A major source of adverse impact on fish runs in the Columbia River has been the construction of large hydroelectric dams by the federal government. In the first 270 miles of the river which forms the border between the two states, there are three large federal dams. There are four additional federal dams within the State of Washington on the remaining portion of the Columbia and Snake Rivers with which Idaho is concerned. Thus, anadromous fish seeking to return to Idaho waters are confronted with seven major federal dams which are responsible for a substantial fish mortality. The states of Washington, Oregon and Idaho, individually and collectively, have sought improvements in these dam facilities to reduce fish mortality. The fish mortality due to these dams means that during those periods in which there are adequate fish runs in the Columbia River to support a reasonable sport and commercial harvest a substantial curtailment of that harvest will simply increase the fish mortality due to dams without necessarily resulting in any real increases in fish reaching the State of Idaho. Such a curtailment of an appropriate harvest would effectively increase

the natural wastage of the resource. If one assumes that Idaho has some interest in the anadromous fish outside of its jurisdiction, and we are not conceding that assumption, this Court in *Kansas v. Colorado*, 206 U.S. 46, 117 (1907), has recognized that the beneficial use of water by Colorado, even though some injury occurred to the State of Kansas, did not justify relief. We submit that the beneficial use of the fish in the lower Columbia which minimizes natural wastage of the resource is similar and outweighs the "injury" to Idaho.

Washington and Oregon are concerned with the conservation of the fish run as evidenced by the restrictions that they have placed on fishing activities within their jurisdictions for a number of years. Since 1957 no commercial fishing has been permitted above Bonneville Dam, which is the first dam on the Columbia River, except for Indian fisheries. It should be noted that at the present time the states of Washington and Oregon are required by judicial decree in *Sohappy v. Smith*, 302 F. Supp. 899 (D.C. Ore. 1969) to permit Indians to obtain an equitable portion of the entire fish run. More recently, the United States District Court of Oregon in 1974 amended the *Sohappy* decree, *supra*, under its continuing jurisdiction and specifically decreed that Indians are entitled to 50% of the harvestable fish. That amendment was based on a decision rendered in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (aff'd Ninth Cir.,

June 4, 1975). The complexities of managing the fish runs and recognizing treaty Indian fisheries on the Columbia River and its tributaries present a complex regulatory situation which is a strong argument for not exercising judicial intervention. This Court noted in *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945), that situations involving the interest of quasi-sovereigns:

> "* * * present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiations and agreement, pursuant to the Compact Clause of the federal constitution."

The legislative action already taken by the State of Oregon to permit the addition of the State of Idaho to the Oregon-Washington Columbia River Fish Compact and the similar action now pending in the State of Washington strongly support the suggestion that the Court reject the Idaho suit without prejudice.

We submit that the water right adjudication cases involving states, for example, *Arizona v. California*, 283 U.S. 423 (1931), 298 U.S. 558 (1936), 373 U.S. 546 (1963), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Wyoming v. Colorado*, 259 U.S. 419 (1921), and *Kansas v. Colorado*, 206 U.S. 46 (1907), *supra*, are not apropos to the current proceeding. In the situations giving rise to those cases

either a state or its citizens were appropriating water which by virtue of its appropriation was not available for use by others, and if the upstream diversion or use could be enjoined, the water would in fact be available for use by the downstream consumer. In the present situation, a failure to harvest fish downstream on the Columbia River does not automatically mean that those fish will be available for harvest by an upstream state and its citizens. First, there are mixed stocks of fish in the river which spawn in various areas; not all of the fish are destined for the Snake River and its tributaries. Further, there is a substantial natural mortality of the fish involved in the upstream migration. Thus, the preclusion of an appropriate harvest can simply result in greater natural wastage of the resource. Furthermore, in the water cases the Court has recognized an interest in water, and we are unaware of any cases which have held that a state has a proprietary interest in migratory animals located outside of its jurisdiction.

The Court in *Missouri v. Holland*, 252 U.S. 416 (1920), rejected the contention of the state of Missouri that the federal government could not, pursuant to an international treaty, exercise some control over migratory birds when they were located within the state of Missouri. The Court noted that the subject matter; i.e., the birds, were only transitorily within the state and had no permanent habitat therein. *Supra* at 435. The Court further

rejected the contention that the state could exercise exclusive authority by virtue of an assertion of title to the migratory birds. *Supra* at 434. We believe it would be anomolous for the Court, having recognized limitations on the authority of the state over a migratory resource within its boundaries, to find that a state has sufficient interest to affect the actions of other states regarding migratory fish located within another state's jurisdiction. The concept argued here on behalf of the State of Idaho would appear to apply with equal force to migratory animals, birds or fish. We respectfully submit that there is no basis for the assertion of such claims for extraterritorial jurisdiction over those resources.

CONCLUSION

We do not believe that it is appropriate for the Court to assume jurisdiction of this matter, and in support we quote the following language by Justice Frankfurter in *West Virginia v. Sims*, 341 U.S. 22, 27 (1951):

> "* * * The delicacy of interstate relationships and inherent limitations upon this Court's ability to deal with multifarious local problems have naturally led to exacting standards of judicial intervention and have inhibited the formation of a code for dealing with such controversies."

Similar sentiments were expressed by the Court in *New York v. New Jersey*, 256 U.S. 296, 313 (1921), when the Court observed that the problems between New York and New Jersey were,

> "* * * more likely to be wisely solved by cooperative study, by conference and mutual concession on the part of representatives of the state so vitally interested in it than by proceeding in any court, however constituted."

We respectfully submit that the Court should deny the motion by the State of Idaho for leave to file a complaint in this action.

DATED this 31 day of July, 1975.

Respectfully submitted,

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Attorney General

EDWARD B. MACKIE
Deputy Attorney General
Attorneys for
State of Washington

APPENDIX 1

40 STAT. 515

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress of the United States of America hereby consents to and ratifies the compact and agreement entered between the States of Oregon and Washington relative to regulating, protecting, and preserving fish in the boundary waters of the Columbia River and other waters, which compact and agreement is contained in section twenty of chapter one hundred and eighty-eight of the general laws of Oregon for nineteen hundred and fifteen, and section one hundred and sixteen, chapter thirty-one, of the session laws of Washington for nineteen hundred and fifteen, and is as follows:

> "All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both States."

Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters.

APPENDIX 2

WASHINGTON HOUSE BILL NO. 156

1975 Legislative Session as passed by the
Washington State House of Representatives

AN ACT Relating to anadromous fish; providing for a compact between the states of Washington, Oregon and Idaho relative to anadromous fish in the waters of the Columbia and Snake Rivers and providing for the ratification thereof; repealing section 75.40.010, chapter 12, Laws of 1955 and RCW 75.40.010; and repealing section 75.40.020, chapter 12, Laws of 1955 and RCW 75.40.020; and repealing the compact now existing between Oregon and Washington relating to fish in the concurrent waters of the Columbia River only upon approval by the congress of the compact provided for in section 1 of this 1975 act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. Should congress by virture of the authority vested in it under Article 1, section 10, of the Constitution of the United States, providing for compacts and agreements between states, ratify the following as a definite compact and agreement between the states of Washington, Oregon and Idaho, then, and in that event, there shall exist between the states of Washington, Oregon and Idaho a compact and agreement, the purport of which shall be substantially as follows:

The compact states acknowledge that they have a common interest in the conservation and management of anadromous fish stocks in the Columbia River drainage and they mutually agree to assume joint responsibility in developing sports and commercial fishery programs and regulations which will maintain and preserve the resource for the interest and benefit of all users.

Membership from the compact states shall be the Idaho fish and game department, the fish commission of the state of Oregon, Oregon wildlife commission, Washington department of fisheries and the Washington department of game or the successor agency to any of the above. The compact members may appoint advisors to serve as needed.

All rules and regulations now existing or which may be necessary for the conservation and management of anadromous fish in the waters of the main stem of the Columbia River from its mouth to the mouth of the Snake River and the waters of the main stem of the Snake River from its mouth to the mouth of the Salmon River, shall be made, changed, altered and amended in whole or in part by a majority vote. In voting on rules and regulations, each state shall be entitled to one (1) vote. Idaho will vote only on those regulations which might have a substantial impact on fish destined for Idaho waters.

The individual states shall be responsible for the management of anadromous fish stocks in per-

tinent tributary streams and shall be guided in such management by the intent and purpose of this compact.

NEW SECTION. Sec. 2. The compact and agreement now existing between the states of Washington and Oregon for the purpose of regulating, protecting or preserving fish in the waters of the Columbia River, or its tributaries, over which the states of Washington and Oregon have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction shall be of no force and effect upon ratification by the congress of the compact and agreement provided for in section 1 of this 1975 act.

NEW SECTION. Sec. 3. The following acts or parts of acts are each hereby repealed:

(1) Section 75.40.010, chapter 12, Laws of 1955 and RCW 75.40.010; and

(2) Section 75.40.020, chapter 12, Laws of 1955 and RCW 75.40.020;

It is the intention of the legislature that the repealers contained in this section shall become effective only upon ratification by the congress of the compact and agreement provided for in section 1 of this 1975 act.

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State of Idaho ex rel. Cecil D. Andrus, Governor, et al., plaintiff

v.

State of Oregon and State of Washington

On motion for leave to file a complaint

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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STATE OF IDAHO EX REL. CECIL D. ANDRUS, GOVERNOR, ET AL., PLAINTIFF

v.

STATE OF OREGON AND STATE OF WASHINGTON

ON MOTION FOR LEAVE TO FILE A COMPLAINT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted pursuant to this Court's order of October 6, 1975, inviting the Solicitor General to express the views of the United States in this case.

The State of Idaho seeks to invoke the original jurisdiction of this Court to require the States of Washington and Oregon to admit it to the Columbia River Fish Compact (Complaint, p. 21), a compact between the States of Washington and Oregon approved by Congress on April 8, 1918, 40 Stat. 515, under which the two States jointly regulate their fishery for Columbia River anadromous fish.[1] Idaho also prays that the Court determine

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[1]The Columbia River flows from the mountains of Idaho through a portion of the Canadian province of British Columbia across the State of Washington, becoming the border between Washington and Oregon for its final approximately 270 miles before entering the Pacific Ocean. One of its principal tributaries, the Snake River, begins in Idaho and joins the Columbia in southern Washington. The Columbia River system is a significant producer

its equitable portion of the fishery (Complaint, p. 21) and require Washington and Oregon to modify their regulation of the fishery so as to protect Idaho's interests. Washington and Oregon are named as defendants and have opposed the motion; the United States is not a party to the suit.

While we are not unsympathetic to Idaho's desire to protect its fisheries, we suggest that the Court should not grant leave to file the complaint at this time but should deny the motion without prejudice to the filing of a subsequent motion and complaint.

1. The thrust of Idaho's complaint is that it should be made a party to the Columbia River Fish Compact and that it should be assured that its interests will be protected within the compact. At the time Oregon filed its Memorandum in Opposition, the Oregon Legislature had passed a bill granting that State's consent for Idaho to join in the Compact. (Ore. Memo. in Opp., p. 5). That bill has now become law. Chap. 709, Oregon Laws of 1975.

A similar bill sponsored by the Governor of Washington was introduced in the Washington legislature, passed the Washington House of Representatives 93 to 5, and was recommended for passage by the pertinent Senate committee (Wash. Br. in Opp., p. 4). But the term of the legislature ended before Senate approval of the bill (*ibid.*). We are informed by counsel for the State of Washington that the next plenary session of the Washington legislature will be in January 1977 and there is reason to believe that the bill may be enacted in that session. If so, the

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of anadromous fish, which are spawned in Washington, Oregon and Idaho, migrate to the sea, and seek to return to their original spawning grounds. These fish are the subject of important commercial fisheries in the sea and as they return to their spawning grounds (see, *e.g.*, Mot. 2-5; see also *1975 Commercial Atlas & Marketing Guide*, pp. 544-545 (106th ed.)).

three states will then be in a position to present the broadened compact to Congress for its approval (United States Constitution, Art. I, Sec. 10) and that aspect of Idaho's complaint in this Court would become moot.

Similarly, Idaho's request for an equitable apportionment and for judicial supervision of the fishery may well become unnecessary if it is made an equal member in the Compact, and can thus participate in the day-by-day management of the fishery in the three-state area.

There is thus no need for the Court to exercise its original jurisdiction at this time. Moreover, the relief asked by Idaho would require the Court to involve itself in "[t]he complex factual pattern surrounding the anadromous fish problem * * * " (Mot. 4) and would also require the Court to modify a compact approved by Congress between two States, a matter entrusted by the Constitution to the States with the consent of Congress (Art. I, Sec. 10).[2]

Accordingly, the Court should decline to exercise its original jurisdiction on these pleadings at this time. See *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27; *Illinois* v. *City of Milwaukee*, 406 U.S. 91. However, if Washington should fail to enact legislation permitting Idaho to join the Compact and new pleadings are then filed, the Court may wish to consider the questions presented anew.

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[2]While this Court has been called upon to interpret interstate compacts, *Arizona* v. *California*, 373 U.S. 546, or to apportion water rights in the absence of such compacts, *Arizona* v. *California*, 298 U.S. 558, we are unaware of an instance in which the Court has ordered that a State be made a member of such a compact.

2. While for the reasons stated above it is unnecessary to reach the issue now, it appears that the United States is an indispensible party to this litigation. As the Court is aware, there are Indian tribes in Washington and Oregon which have treaty-protected fishing rights. See *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44. See also *United States* v. *State of Washington,* 520 F.2d 676 (C.A. 9), certiorari denied, January 26, 1976 (Nos. 75-588, 75-592, and 75-705). The tribes in Oregon and Washington which have such rights on the Columbia River include the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Reservation, and the Confederated Tribes and Bands of the Yakima Indian Nation; in Idaho the Nez Perce Tribe of Idaho has similar rights. *Sohappy* v. *Smith,* 302 F. Supp. 899, 904 (D. Ore.).

Thus, even though the States may properly agree by compact to take conservation measures with respect to the fishery, it would be improper for a court to make an equitable apportionment of the fishery among the three States in the absence of the Tribes or the United States (as their trustee) or both.[3] Since the Tribes' fishing rights are guaranteed by treaties with the United States, the States are not free to divide the fishery in such a way as to interfere with those rights. See *Department of Game* v. *Puyallup Tribe, supra.* Thus, as in an equitable apportionment between States of the waters of an interstate stream as to which the United States has rights, the United States would be an indispensible party. See *Arizona* v. *California,* 298 U.S. 558, 571.

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[3]There may well be conflicts between the interests of the upstream and downstream tribes which would require separate representation.

This obstacle to proceeding with the litigation could perhaps be overcome by the intervention of the United States for the purpose of protecting the rights of the Indians as was ultimately done in *Arizona* v. *California*, 373 U.S. 546, and more recently in *State of Texas* v. *State of New Mexico*, No. 65, Original, October Term, 1975. See also *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102. Whether the United States would ultimately seek to intervene here, however, need not be decided at this time, pending further action by the state legislatures and by Congress toward a solution of the fisheries management problem through interstate compact.

For the foregoing reasons, the motion for leave to file a complaint should be denied at this time.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 67, Original

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

PLAINTIFF'S MEMORANDUM IN REPLY TO AMICUS CURIAE BRIEF OF UNITED STATES

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 67, Original

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

PLAINTIFF'S MEMORANDUM IN REPLY TO AMICUS CURIAE BRIEF OF UNITED STATES

This memorandum is submitted pursuant to the Court's request of March 22, 1976, that Plaintiff, State of Idaho, file a memorandum in reply to the amicus curiae memorandum of the United States filed previously in this matter. The United States has suggested that the Court not grant the motion to file the complaint at this time but should deny the motion without prejudice to the filing of the subsequent motion and complaint. (U.S. Memo-Page 2.) That suggestion is based on the United States' argument that the Oregon State Legislature has already passed a bill granting that State's consent for Idaho to join the

compact and that the bill has now become law. Chapter 709, Oregon Laws of 1975. Further, the United States argues that a bill similar to the one passed in Oregon was sponsored by the Governor of Washington and passed by the Washington House of Representatives by a vote of 93 to 5 and was recommended for passage by the pertinent Senate committee. The United States notes that the term of the legislature for the State of Washington ended before Senate approval of the bill.

Chapter 709, Oregon Laws of 1975, is in no manner acceptable to the state of Idaho for the reason that it does not adequately protect Idaho's interest in the steelhead runs. It allows each state one vote and the rule would be by "majority" vote. The bill allows the compact states to, by majority vote, control streams and rivers in *Idaho,* Oregon and Washington as they relate to anadromous fish. It can be clearly seen that the geographical relationship between Washington and Oregon would make the interests of those two states nearly identical while Idaho's interests would be much different. This would allow Washington and Oregon to combine to outvote Idaho and effectively control Idaho's anadromous fisheries while Idaho would have little if any say in the management of the problem. The peculiar nature of the anadromous fish runs when combined with the inequitable procedure set out in Oregon's legislation would leave Idaho in a position no better than it now enjoys. The mere membership in the compact as outlined in Chapter 709, Oregon Laws of 1975, does not guarantee Idaho any protection against the further depletion of the salmon and steelhead runs returning to Idaho.

Further, there is no guarantee that, in the first instance, the State of Washington will pass, at the next plenary session of the legislature in January of 1977, a bill allowing Idaho to become a member of the compact. Even should the state of Washington pass such a bill in January of 1977, there is absolutely no

guarantee that the bill, as passed, would be acceptable to the State of Idaho nor does it guarantee that the bill would help to alleviate the problem of rapid depletion of the salmon and steelhead populations and their failure to return to the State of Idaho for spawning purposes. Plaintiff maintains further that the salmon and steelhead runs returning to Idaho are of such a small quantity that waiting until January of 1977 for a "possible" resolution of this problem will simply bring the entire Pacific Northwest closer to the day when salmon and steelhead runs are but a mere bit of history.

The United States appears to argue that the issues presented by Idaho's motion for leave to file complaint and brief in support thereof will become moot *if* Washington passes a bill allowing Idaho into the compact. This is in no sense true. As previously pointed out, the Oregon legislation is totally unsatisfactory and there is no guarantee that the state of Washington will pass legislation, let alone legislation which will be acceptable to the state of Idaho and the state of Oregon as required for compact membership. Under the test urged by the United States Government any issue that could, by any stretch of the imagination, possibly become moot in the future would not be tried in a court of law. It can be judicially noticed that no case is moot until it becomes moot, in fact.

The United States government at page three of their amicus curiae brief argues that the Plaintiff's request for an equitable apportionment and judicial supervision of the fishery will become unnecessary if Idaho is made an equal member of the compact. The assumption made by the United States is twofold: 1) that the state of Idaho will be made a member of the compact, and 2) that it will be made an *equal* member of the compact. Neither of the actions has happened and even if Idaho is made an "equal member" of the compact, Idaho's interests are sufficiently different from the nearly identical interests of the states

of Oregon and Washington that on many critical issues the state of Idaho could and would be outvoted by a vote of two to one. The admission of Idaho as a voting member of the Compact would not guarantee that the states of Washington and Oregon would not combine, because of their like interests, to defeat Idaho's interest in the steelhead and salmon runs. The Court should not, as the United States asks, decline to exercise its original jurisdiction. The United States in effect argues that if the Court simply declines to hear the case at this time, the problem will go away. The only things that will "go away" if action is delayed are the anadromous fish of the Pacific Northwest.

The steelhead and salmon decline is a problem which the states of Oregon, Washington and Idaho have been aware of for some time. Idaho has made many efforts to become a member of the compact and it appears to be more than coincidental that the Oregon legislature finally acted on a bill, even though unacceptable to the state of Idaho, to allow Idaho into the compact *after* the state of Idaho filed its motion for leave to file with this Court. If the Court should decline to exercise its jurisdiction at this time, there would be nothing that would keep the state of Oregon from repealing Chapter 709, Oregon Laws of 1975, and there would be no reasons, other than those ignored for many years in the past by the state of Washington, for the legislature in the state of Washington to pass legislation allowing Idaho into the Compact on terms acceptable to the Plaintiff.

The United States argues that this Court should decline jurisdiction and simply wait to see whether the problem can be worked out. The problem has not worked out in the past and that is the sole reason that the Plaintiff filed this action in the first instance. Further, the salmon and steelhead migration crisis can only be defined as just that; a crisis. The declining number of

salmon and steelhead re-entering Idaho for spawning has become disasterous to the State, its tourist industry, the sport fishermen and, more importantly, to the salmon and steelhead species themselves. It is respectfully suggested that any delay in the resolution of this matter could well be the death knell of the anadromous fish runs in the Pacific Northwest.

The United States argues in part II of their brief at page 4, that the United States is an indispensable party to this litigation. Plaintiff, state of Idaho, maintains that the United States is not an indispensable party to this action in that Plaintiff seeks merely an adjustment of the rights between the states of Washington and Oregon as to the proper apportionment of fish resources to grant Idaho its fair share of the runs as well as to continue the species. Plaintiff recognizes that various Indian tribes of the Pacific Northwest have treaty guaranteed fishing rights. *Department of Game* v. *the Puyallup Tribe*, 414 US 44 (1973); and *United States* v. *State of Washington*, 520 Fed 2d, 676 (1975), Court of Appeals 9, *cert. denied*, January 26, 1976 (75-588, 75-592, and 75-705). It is Plaintiff's contention that these cases recognize pre-existing Indian treaty rights allowing them to take certain numbers of fish from their native fishing grounds. However, the protection of these treaty rights and the day-to-day management of the fisheries from which the Indians remove their treaty-right allotment are to be governed by the states in which the Indian tribes reside, subject to the guidelines as set out in those cases. Therefore, the states of Oregon and Washington can and will represent the rights of the tribes in this lawsuit and the United States is not an indispensable party. Both cases cited above support these propositions. Likewise, the pre-existing treaty rights of the Nez Perce Tribe of Idaho were determined in *So Happy* v. *Smith*, 302 Fed Supp 899, 904 (D Oregon).

In *United States* v. *State of Washington*, 520 Fed 2d 676

(1975), the Court was presented with an appeal from a decision in the western district of Washington. The Ninth Circuit Court of Appeals upheld, in almost all particulars, the decree of the District Court which held that the State and its agencies can regulate *off-reservation* fishing by treaty Indians at their usual and customary grounds only if the State first satisfies the Court that the regulation is reasonable and necessary for conservation. The lower court also awarded the Indians the right under treaties to fifty percent of the harvest at their "usual and accustomed grounds and stations."

The State of Idaho in no way seeks to interfere with the fifty percent figure as established in that case and reaffirmed by the Ninth Circuit Court of Appeals. The State of Idaho merely seeks a decision equitably apportioning the *remainder* of the anadromous fish in the drainage between and among the states of Washington, Oregon and Idaho. In *United States* v. *Washington,* the Ninth Circuit Court of Appeals specifically stated that the state may interfere with Indians' treaty rights to fish when necessary to prevent the destruction of a run of a particular species in a particular stream; i.e., for conservation purposes. Therefore any intervention on the part of the United States would be superfluous since the cases which are cited in the United States' brief specifically state that conservation laws aimed at the preservation of a species of fish on a river may be enforced even as against Indians with treaty rights.

Secondly, the prime thrust of the Plaintiff's complaint is to the effect that it is the states of Washington and Oregon, not the Indians, that are responsible for the depletion of the anadromous fish runs. The State of Idaho does not in any manner contend that the 50%-50% ratio is wrong nor does the complaint in any manner affect the Indians' rights to fish other than from the point of view that the state may make and enforce reasonable regulations in order to conserve a species of fish and that those

those regulations and enforcement procedures may run as against the Indians.

In the case of the *Department of Game* v. *the Puyallup Tribe*, 414 US 44 (1973), this Court was reviewing regulations prohibiting net fishing for certain species of fish which were applied to commercial fishing by the Puyallup Indians who, under a federal treaty, had the right to take fish at all accustomed places in common with all citizens. It does not appear from the reported opinion in that case that the United States was a party in any manner. Further, the Court held that State fishing regulations may be enforced against Indians where such control is necessary to conserve a species even if such enforcement affects treaty rights.

Plaintiff's complaint goes to the issue of an equitable apportionment of existing anadromous fish runs between and among the state of Idaho, the state of Washington, and the state of Oregon. Nowhere are the Indians named as Defendants nor does State of Idaho maintain that any decision rendered by this Court would be binding on them. Further, the United States at page four, of the United States' memorandum, states as follows:

> Since the tribe's fishing rights are guaranteed by treaties with the United States, the states are not free to divide up the fishery in such a way as to interfere with those rights.

Plaintiff does not argue this point but rather argues that an equitable apportionment of the fish to which the Indian treaty rights do not speak and to which the Indians are entitled under the decisions of *Department of Game* v. *Puyallup Tribe* and *United States* v. *State of Washington*, supra, may, and should, be decided without the intervention of the federal government. No rights of the Indians need be affected and because of the situation with the anadromous fish runs any decision of this Court regarding validity of state regulations or regulations

promulgated by the compact will be aimed at conservation measures, measures which have expressly been approved as within the state's police power regulation by the cases cited herein. The cases are specific as to: (1) the state may regulate Indian fisheries for the conservation of a species and, (2) that where states attempt only to determine their rights and obligations with regard to that portion of the anadromous fish runs to which the Indians have no entitlement by reason of treaty, the apportionment may be decided without the presence of the Indians or their trustee. There appears no valid reason that the Court should hold the United States to be an indispensable party in this matter. Further, even should the United States Government be determined to be an indispensable party, this is not an adequate reason for denial of the motion for leave to file.

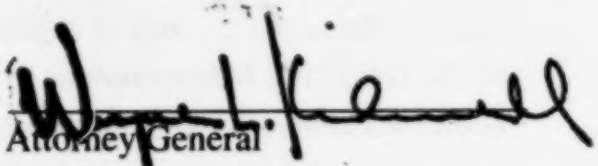
Therefore, this action may be litigated without the intervention of the United States government in that the rights of the states of Washington, Oregon, and Idaho will be determined and an equitable portion of the fish allotted to each state, while simultaneously taking into account the respective Indian treaty rights with which each state has been entrusted as a result of the case law cited above.

CONCLUSION

As stated repeatedly by the United States in its brief, the issue of an intervention by the United States need not be decided at this time. However, what does need to be decided at this time is whether or not the Court will decline to accept jurisdiction of this matter thereby putting off any meaningful solution to a rapidly deteriorating situation involving the salmon and steelhead runs for the entire Pacific Northwest and thereby endanger the survival of the species or, whether this Court will accept jurisdiction and determine the various states' interests and entitlements, thereby alleviating the crisis and protecting the anad-

romous fish migrations for future generations of Americans yet to come.

For the foregoing reasons, Plaintiff respectfully requests this Court to grant the motion for leave to file.



Attorney General
Counsel for Plaintiff

April, 1976

PROOF OF SERVICE

I, WAYNE L. KIDWELL, Attorney General, State of Idaho, attorney for Plaintiff herein, State of Idaho, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9th day of April, 1976, I served three copies of the foregoing Memorandum by mailing the same in a duly addressed envelope, with airmail postage prepaid to:

1. Honorable Daniel J. Evans, Governor of the State of Washington, State Capitol, Olympia, Washington, 98104.

2. Honorable Slade Gorton, Attorney General of the State of Washington, Temple of Justice, Olympia, Washington, 98501.

3. Honorable Robert Straub, Governor of the State of Oregon, State Capitol, Salem, Oregon, 97310.

4. Honorable R. Lee Johnson, Attorney General of Oregon, 100 State Office Building, Salem, Oregon, 94310.

5. Robert E. Smylie, Counsel for Amici organizations, P.O. Box 2527, Boise, Idaho, 83701.

6. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C., 20530

Wayne L. Kidwell

Attorney General for
the State of Idaho
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 67, Original

STATE OF IDAHO, ex rel. CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

MOTION FOR LEAVE TO FILE AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

Columbia River Fishermens Protective Union

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IN THE
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STATE OF IDAHO, ex rel. CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

MOTION FOR LEAVE TO FILE AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

The Columbia River Fishermens Protective Union respectfully moves this Court for leave to file the accompanying brief, amicus curiae, in the above-entitled proceeding. The states of Oregon and Washington support this Motion. The Columbia River Fishermens Protective Union represents the commercial fishermen who fish the lower Columbia River. These fishermen derive their livelihood from the fish resource of the Columbia River. Many are third and fourth generation fishermen on the river. They possess strong and

obvious ecological and economic interests in the preservation of viable fish runs. These fishermen have opposed continuously and vigorously the ceaseless construction of federal hydroelectric dams on the Columbia River and its tributaries. These hydroelectric dams destroy salmon and steelhead by the millions and are responsible for any recent depletion in the Columbia River fish resource. These dams supply the state of Idaho's power, irrigation, recreation and transportation needs but they deprive commercial fishermen of their livelihood.

Three primary groups use the Columbia River fish resource: the treaty Indians whose interests are represented in this action by the United States as amicus curiae; the tourist and hobby fishermen whose interests are represented in this action by this Court's grant of amici curiae status to their representative organizations; and, the commercial fishermen whose interests are presently unrepresented in this action. As fully developed in the accompanying brief, the commercial fishermens' interests will be the most directly and drastically affected by the actions of this Court.

The accompanying brief sets forth more fully the interests and arguments of the fishermen on the issues involved herein; and, in particular, their concern with the harmful effect on the fish resource of further unwarranted judicial

intrusion into the management of this natural resource.

DATED this day of September, 1976.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 67, Original

STATE OF IDAHO, ex rel. CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

AMICUS BRIEF

Commercial fishing on the Columbia River has been regulated closely since Congress approved the Oregon-Washington Columbia River Fish Compact in 1918. The Columbia River Fishermens Protective Union, or its predecessor organization, has existed and represented the interests of the Columbia River commercial fishermen including Compact regulatory proceedings for over a century. It has advocated proper management of the fish resource and resisted the relentless construction of hydroelectric dams which have invariably depleted the resource.

Because of Oregon-Washington Compact regulations the salmon and steelhead fish runs which Idaho contends are threatened are not commercially fished. Treaty Indians do fish these runs for ceremonial and subsistence purposes. Thus, Idaho should more properly have filed its grievance against the United States which represents the treaty Indian interests against the states of Oregon and Washington in other fish-related litigation c.f. Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).

The states of Oregon and Washington do not represent the interests of commercial fishermen in this matter. The Columbia River Fishermens Protective Union is presently involved in litigation with the state of Oregon and Washington regarding their allocation of the fish resource among user groups. (c.f. The Columbia River Fishermens Protective Union v. State of Oregon, Clatsop County Circuit Court, Oregon, August 13, 1976 and Columbia River Fishermens Protective Union, Inc. vs. Donald Moos, Thurston County, Superior Court, Washington, No. 55339, August 13, 1976.)

Commercial fishermen do not overfish the runs in question; they do not fish them at all. Commercial fishing has been banned on summer chinook since 1964 and on spring chinook since 1974. Commercial fishermen in Oregon cannot take steelhead trout from the Columbia River because it is classified as a game fish and may not be sold. Commercial fishermen lose thousands of dollars each year because the Compact restricts their net sizes to prevent any incidental damage to steelhead trout while they fish other salmon

runs.

Conservation is the primary goal of the Compact regulations. For example, before the Compact members permit weekend or hobby fishing or any commercial fishing on a given fish run, escapement goals must be met. An escapement goal for a given fish run is the optimum number of spawning parents needed to provide sufficient offspring in the available pool rearing areas to produce the maximum number of healthy fish. Under normal conditions more or less escapement than the optimum number will not result in a greater production of fish. Until the fish resource is being optimally renewed there is no fishing. What better protection of the resource can be provided?

Any actual and ongoing depletion of the fish resource would not be alleviated by the state of Idaho's action before this Court. The hydroelectric dams, not inadequate regulation, are depleting the resource. These dams kill the smolts heading for the ocean by the millions and the returning pre-spawners by the thousands.

Only extraordinary efforts by the Compact members have saved and revitalized this fish resource. There are ten dams on the mainstem Columbia River and nine dams on the mainstem Snake River - a total of nineteen barriers to the fish. As the result of these dams, only fifty miles of freeflowing stream remains in the Columbia and only one hundred freeflowing miles in the Snake.

Over fifty percent (50%) of the Snake

River is no longer accessible to spawning fish. The dams have blocked and inundated spawning area after spawning area. The dams are especially destructive of the ocean-bound juveniles. During periods of low flow in the Columbia River, many ocean-bound fish are killed in the dam turbines. During periods of high flow, spillage over the dam kills many ocean-bound fish by nitrogen supersaturation. The fluctuating high and low flows of recent years have particularly affected the runs and species of salmon and steelhead trout spawned in Idaho.

Each dam kills an estimated fifteen percent (15%) of the declining balance of the pre-spawning fish returning upstream over its fish ladders. This dam loss factor requires the Compact to set incredibly high escapement goals in order to insure that sufficient numbers of fish reach the farthest upriver Idaho spawning grounds. The lower river commercial fishermen often sit on the shore as the salmon run passes knowing that most of the passing fish will be wasted because of the dams' loss factor. Thus, the Compact members actually waste much of the fish resource in their present effort to insure that particular returning salmon and steelhead runs reach Idaho in large numbers.

In spite of these facts and the long history of detailed regulation of the fish resource, the state of Idaho seeks herein:

(1) admission to the Oregon-Washington Fish Compact; and,

(2) a so-called Court-directed "equitable apportionment" of certain salmon and steelhead runs on the Columbia River between the three states.

Idaho also apparently seeks to be made more than an equal member to this Compact.

In seeing this relief, the state of Idaho asks this Court to exercise the extraordinary power of granting its original jurisdiction to hear this matter. This Court stated in Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972) that it would only grant original jurisdiction in "appropriate cases."

This is not an appropriate case. The United States Constitution at Article I, Section 10 grants the power to approve Compact agreements between the states to Congress. The state of Idaho asks this Court to take the unprecedented step of forcing Congress to accept an additional member to a Compact without Congressional approval. Furthermore, Idaho requests that this Court compel Idaho's membership complete with special privileges not accorded to the other Congressionally-approved members. Idaho seeks this relief for a singular and easily discernable reason- to assert rights in migratory fish which it does not possess under this Court's ruling in Missouri v. Holland, 252 U.S. 412 (1920).

The state of Idaho refers to the subject matter of its motion as "the complex factual problem surrounding the anadromous fish problem." (Idaho Mot., p. 4). Hydroelectric dams, advocated in the past by various Idaho state agencies, have

created the situation that prompted the filing of this matter. The relief sought by Idaho will merely contribute to the complexity of the problem, not help to solve it.

Any imposition of arbitrary apportionment figures to any single state or user group would ignore the realities of effective fish management under environmental conditions which change daily. Such apportionment would spur continuous litigation by user groups. Judge Belloni, in Sohappy v. Smith, supra, is in his ninth year of presiding over continuing litigation in apportioning fish between treaty Indians and other user groups on the Columbia River. In Sohappy, supra, Judge Belloni has commented repeatedly that the fish runs can only be managed effectively by the state agencies. This subject matter contains a Pandora's box of factual disputes which can and should be handled by administrative agencies which possess local knowledge and special expertise in the subject matter.

Practically, this case is moot. Oregon has passed legislation admitting Idaho as an equal member to the Compact regarding the very runs in question. Idaho's interest in these runs coincides with that of the hobby and tourist-oriented majority of members of the Oregon Fish and Game Commission who cast Oregon's Compact vote. Washington will pass similar legislation in its next session. Its Director of Fisheries, who casts its Compact vote, is subject to intense pressure in his state from hobby and tourist fishermen. Idaho does not seek admission as an equal member, but requests special status in order to

advance hobby interests over those who fish for their livelihood.

The United States is an indispensable party to this matter. The treaty Indians are the only remaining non-Idaho fishermen who fish the runs in question. The United States represents their interests. The majority of Columbia River salmon are actually taken in the ocean in the intense fisheries offshore from Alaska, California, and British Columbia. These areas are not subject to Compact regulations. The federal Fishery Conservation and Management Act of 1976, Public Law 94-265, which takes effect on March 1, 1977 may preempt state regulation of all ocean fishing.

Idaho enjoys an alternative forum. It can apply for admission to the Compact through the United States Congress. There is no immediacy to Idaho's motion. The runs in question are not presently commercially fished. The Compact's optimum escapement policy precludes any damage to the runs beyond that caused by hydroelectric dams. Idaho will not be damaged by following the political process. Idaho supported the dams; it must live with them and the consequences they produce, and not seek special treatment to place those results onto the shoulders of other innocent parties.

In the opinion of these petitioners, Idaho seeks admission to the Compact and Court-directed apportionment with intent to shift further the balance of competing interests in the Compact to the side of the hobby and tourist fishing industry. Representatives of the hobby and tourist

fishermen regularly appear at Compact meetings to advocate the elimination of commercial fishing on the Columbia River. They seek to elevate play above enterprise.

Idaho seeks this Court to impose an extraordinary and inequitable solution to a problem which is presently being solved by appropriate ordinary and equitable means. This Court should deny Idaho's motion.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 67, Original

STATE OF IDAHO, ex rel. CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game,

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI

Izaak Walton League of America, Inc.
Oregon Division
Save Oregon's Rainbow Trout, Inc.
Idaho Wildlife Federation
Trout Unlimited
National Headquarters
Salmon River Chamber of Commerce
Boone and Crockett Club
Greater Boise Chamber of Commerce
Greater Lewiston Chamber of Commerce
Wildlife Resources, Inc.
Salmon Chamber of Commerce
Sport Fishing Institute
Trout Unlimited & Northwest Steelheaders Council
Washington State Sportsmen's Council

LANGROISE, SULLIVAN & SMYLIE
Of Counsel

ROBERT E. SMYLIE
Attorney for Amici

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vs.

Plaintiff,

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

MOTION FOR LEAVE TO FILE AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Izaak Walton League of America, Inc., Oregon Division; Save Oregon's Rainbow Trout, Inc.; Idaho Wildlife Federation; Trout Unlimited; Salmon River Chamber of Commerce; Boone and Crockett Club; Greater Boise Chamber of Commerce; Wildlife Resources, Inc.; Salmon Chamber of Commerce; Sport Fishing Institute; Trout Unlimited & Northwest Steelheaders Council; and Washington State Sportsmen's Council, whose addresses appear more fully set out in Appendix A to this Motion, respectfully move this Court for leave to file the accompanying brief, amici curiae, in the above-entitled proceeding. The consent of the attorney for the Plaintiff has been obtained. The consent of the attorneys for the defendants was requested but refused. The interest of the proposed amici in this case arises out of their interest in the preserva-

tion of an economically viable sport fishing and tourist industry within the State of Idaho as well as their devotion to conservation and to recreational activities in general and in particular to sport fishing. Some of the above-mentioned amici seek to minimize man's impact on the ecological system of the region involved which at the present time is endangered, while many view the threatened extinction of yet an additional species of wildlife as a degradation of spiritual and economic values.

In this case the State of Idaho seeks a determination regarding these same values and it is believed that the brief which amici curiae request permission to file will set out more completely the argument on the issues involved as well as the interests of the amici.

DATED This 9th day of September, 1975.

Respectfully submitted.

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PROOF OF SERVICE

I, Robert E. Smylie, attorney for the amici in the above-entitled action and a member of the United States Supreme Court Bar hereby certifiy that, on the 9th day of September, 1975, I served a copy of the Motion For Leave to File Amicus Curiae and Brief Amicus Curiae in the above-entitled matter on:

1. Honorable Daniel J. Evans, Governor of the State of Washington, State Capitol, Olympia, Washington, 98104

2. Honorable Slade Gorton, Attorney General of the State of Washington, Temple of Justice, Olympia, Washington, 98501

3. Honorable Robert Straub, Governor of the State of Oregon, State Capitol, Salem, Oregon, 97310

4. Honorable R. Lee Johnson, Attorney General of the State of Oregon, 100 State Office Building, Salem, Oregon, 97310

5. Honorable Cecil D. Andrus, Governor of the State of Idaho, Room 228, Statehouse, Boise, Idaho, 83720

6. Honorable Wayne L. Kidwell, Attorney General of the State of Idaho, Room 225, Statehouse, Boise, Idaho, 83720

7. Joseph C. Greenley, Director, Department of Fish and Game for the State of Idaho, 600 South Walnut Street, Boise, Idaho, 83707

relators and attorney for the Plaintiff and attorneys for the defendants in the above-named action by mailing the same in a duly addressed envelope with air-mail postage prepaid.

Robert E. Smylie
Counsel for Amici

(Date) 9-9-75

Address: 360 Capitol Bldg.
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APPENDIX A

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Greater Boise Chamber of Commerce
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Wildlife Resources, Inc.
Box 332
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Salmon Chamber of Commerce
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Washington State Sportsmen's Council
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Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

AMICUS BRIEF

INTERESTS OF THE AMICI

Amici are groups with varying purposes and are composed of a variety of the constitutents who share a common concern over the continuing decline in the anadromous fish runs within the Columbia River Drainage and the injury being done to the valuable and unique natural resource.

Various of the amici are interested principally in the preservation of an economically viable sport fishing and tourist industry within the State of Idaho. Some are devoted to recreational activities in general and to sport fishing in particular while others seek to minimize the impact of man on a region and an ecological system which is simultaneously both wild and fragile.

Many of the amici view the threatened extinction of yet additional species of wildlife as a degradation of

spiritual values. Besides their concern for the survival of the anadromous fish species, perhaps the only characteristic shared by the amici is their inability to take any meaningful steps on their own to halt the excessive commercial fishing which is destroying the natural anadromous runs to the detriment of sport fishermen and those who view aesthetics as an integral part of life.

Amici join the State of Idaho in appealing to this Honorable Court to exercise its constitutional powers in a manner to assure that the facts and issues involved in this problem may be fully and fairly considered. The life cycle of anadromous fish species, the susceptibility of this cycle to interference by man, and the nature of the sixty year old Columbia River Fish Compact are discussed in detail in Idaho's Motion For Leave to File Complaint and the accompanying Statement in Support of Motion. No repetition is needed here.

Amici, some with a nationwide membership, wish to emphasize that the issues dealt with here are national in scope. Only in modern times have we learned through bitter experience that an apparently innocent disturbance of one part of an ecological system cannot be confined and may cause additional injurious disturbances not presently foreseeable. We do not yet know what irreversible alterations in the life cycle of the anadromous fish and related ecological and biological constituents of the Columbia River Basin Drainage will result from the ecologically sudden and drastic decline in the anadromous fish populations.

The issue presented to this Court is not simply which state shall have access to the greater plunder, but whether a marvelous and valuable unique life form

shall be preserved or allowed to be despoiled. The interests of the amici are in its preservation.

QUESTIONS PRESENTED

I. Should the Court refuse to exercise original jurisdiction in the case where no alternative forum is available and where no alternative remedies are possible?

II. Will an order expanding an existing interstate compact and requiring it to administer an equitable apportionment burden the Court with non-judicial obligations?

SUMMARY OF ARGUMENT

I.

This Court has traditionally decided cases involving the flow of natural resources among states. The states have been considered to be the proper representatives of both their own proprietary interests and the collective interests of their citizens in the flow of such resources. In this case, a grant of original jurisdiction is the only possible means whereby amici and the State of Idaho and its citizens may be heard.

The Court has refused to exercise jurisdiction primarily in cases in which an alternative forum is available. No alternative is available here. Neither the state courts nor lower federal courts may determine the rights of states to the migrating fish of the Columbia River. Only this Court can determine the construction and validity of an interstate compact.

Original jurisdiction was established in order to provide an impartial and orderly adjudication of disputes among the various states of the Union. Since defendant states have refused to negotiate a resolution

of the problem at hand, only this Court can protect the interests of amici.

II.

The Court has become increasingly reluctant to undertake sweeping administrative obligations associated with cases presented to it. The remedy which is sought here, however, will not burden the Court with any non-judicial responsibilities. An expanded compact is an ideally suited mechanism to carry out the desired equitable apportionment of the resource in question.

An order apportioning the rights to fish according to production within each state will encourage the states to increase their facilities for the breeding of fish. A refusal to so order will discourage production and may result in the extinction of the threatened species due to over-commercial fishing.

The most desirable resolution to this dispute would be for the states involved to agree among themselves on a solution to the problem. So far, the States of Washington and Oregon have refused to negotiate on the matter. A grant of original jurisdiction may encourage them to review their decisions and may result in an agreement which will solve the problems presented by this case without resort to a hearing on the Complaint.

ARGUMENT

I.

THIS COURT SHOULD NOT DECLINE TO EXERCISE ORIGINAL JURISDICTION OVER AN EXISTING AND SERIOUS CONTROVERSY AMONG STATES WHEN NO OTHER FORUM IS AVAILABLE FOR RESOLUTION OF THE DISPUTE.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), the Court dealt with a West Virginia statute which required that natural gas deprived from that state's field of production be devoted to the satisfaction of domestic needs before export to other states would be permitted. Pennsylvania and Ohio sought and were granted original jurisdiction by this Honorable Court under the *United States Constitution*, art III, § 2, cl. 2 and 28 U.S.C. § 1251(a). The Court at that time framed the issue in that case in words appropriate to the dispute presented in the instant case:

> "Each suit presents a direct issue between two states as to whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other."
> Id. at 591

The Court further found that the complaining states were justified in seeking the redress of grievances offered by the remedy of original jurisdiction:

> "The attitude of the complainant states is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a two-fold interest, — one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury."
> Id. 591

Similarly in this case, the State of Idaho seeks to vindicate the rights of its citizens. Its representation of citizens' interests before this Court is appropriate for the protection of both public interests, such as preserving state resources, and of private interests, such as aiding the threatened tourist industry.

In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), this Court declined to exercise jurisdiction in a suit by the State of Ohio against foreign polluters. In its discussion, the Court announced a standard for declining to hear a complaint:

> ". . . [A]s a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant *and* (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities." *Id.* at 499 (emphasis supplied).

It is submitted that neither of two conditions set out above as requisite to the declination of jurisdiction is present in the case at bar.

In *Wyandotte Chemicals Corp.* the Court enunciated two principles underlying the grant of original jurisdiction. First was the policy that a state should not have to seek justice in the tribunals of a sister state. Second was that:

> ". . . [A] State, needing an alternative forum, of necessity had to resort to this Court in order to ob-

tain a tribunal competent to exercise jurisdiction over the acts of non-residents of the aggrieved State."

Id. at 500.

Because the instant case involves a dispute between states rather than one between a state and legal persons, these two policies are in effect a single policy which has appeared in numerous cases: the Court may decline jurisdiction when an alternative forum is or has been available for redress of grievances. *See Massachusetts* v. *Missouri*, 308 U.S. 1, 18-19 (1939), quoted in *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972).

The set of circumstances present in the case at bar indicates that the case involves the construction and validity of an interstate compact, a subject totally within the purview of this Court. *Nebraska* v. *Iowa*, 406 U.S. 117 (1972); *Virginia* v. *West Virginia*, 78 U.S. 39 (1871). Since both the State of Washington and the State of Oregon are named as defendants, neither state is available as a forum for resolving this dispute, even if either or both states were prepared to hear the case. Further, the fact that this Court's jurisdiction in actions between states is exclusive forecloses any suit in the lower federal courts. Neither Oregon nor Washington has shown any willingness to amend or expand the Columbia River Fish Compact to include the State of Idaho, and congressional action is thereby foreclosed. Amici are likewise incapable of being heard in any forum and in any manner other than as amici curiae in an action in this Court.

In *Illinois* v. *Michigan*, 409 U.S. 36 (1972), this Court declined to exercise jurisdiction because an appellate procedure could have been employed by the

Plaintiff for the redress of the grievances in issue. No alternative procedures are available in this case. A declination of jurisdiction by this Court will mean that the issues involved can never, and will never, be decided.

In the case of *Nebraska* v. *Wyoming*, 325 U.S. 589, 608 (1945), *order modified*, 345 U.S. 981 (1953), a case involving apportionment of river water, this court exercised original jurisdiction to deal with,

> ". . . a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war."
> *Id.* at 608.

The day of warfare among the states is thankfully long since past. However, "diplomacy" has failed to solve the problem at hand. As a result, this Court is now the only forum capable of resolving the dispute.

II.

THIS COURT WILL NOT BE BURDENED BY ADMINISTRATIVE DUTIES WHICH CAN BE CARRIED OUT BY EXISTING INSTITUTIONS.

The second reason that this Court declined to exercise jurisdiction in the case of *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, was that the Court was presented with so many responsibilities that it was fearful of allocating such a great portion of time to resolving issues of fact and was reluctant to undertake sweeping administrative obligations regarding the case. The Court also appears to be increasingly reluctant to allow isolated cases of secondary importance to monopolize its attention. Recently the Court rejected a proposed settlement by a special master because the Court would "be acting more in an arbitral rather

than a judicial manner." *Vermont* v. *New York*, 417 U.S. 270, 277 (1974).

It is submitted that the relief sought by Idaho would not require extensive findings of fact by the Court, and would not require the Court to perform administrative or arbitral functions. Idaho desires first that the Columbia River Fish Company be expanded to include Idaho; and second that the states along the migration route of the anadromous fish be allowed to remove these fish only in a proportion which to some extent would be based on the production of the fish within each state and which would appear equitable to the Court. The first remedy requires no over-sight on the part of the Court. The second is based on a straightforward formula which may be administered, once it is established by the Court, by the expanded compact. Oppression by a majority of the states within the compact could result at most only in an appeal to this Court to order anew or modify the equitable apportionment formula which is being sought in the first instance. In the event of continuing controversy among the states, the Court could appoint a special master to determine any facts necessary for enforcement of an apportionment decree. No permanent supervisor is requested and none would be foreseeably necessary.

An expanded compact is fully capable of a fair determination of the factual basis for apportionment. There is no reason to believe that it would exercise its fact finding power other than with good faith or that it could not assume responsibilities required by the desired remedy. To the contrary, an order expanding the compact and ordering equitable apportionment of the fish among the parties' would be administerable in the same manner as decisions by the present compact.

Fish hatcheries are now operated by governmental agencies in all of the affected states. Fish populations can be determined with near-mathematical precision. There is no obstacle to the determination of the contribution each state makes to the total population of the migrating species. The decision sought here will encourage all states to maintain and increase their share in the production of young fish. A contrary decision can lead only to the reduction of the total fish population to the irreparable damage of all involved.

In *Ohio* v. *Kentucky*, 410 U.S. 641 (1973), this Court refused to allow Ohio to amend its previously filed complaint. The major reason that the complaint was disallowed was that the special master appointed in the case had recommended that the proposed amendment failed to state a cause of action and therefore would have been of no benefit. The Court in that case at page 644 stated the purpose of the exercise of original jurisdiction:

> "Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. . . . Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear."
> *Id.* at 644.

In that case the Court did not allow amendment because of the failure to state a cause of action in the amended portion of the complaint but did set out that

speedy resolution of interstate disagreements was the goal of the Court.

This case, too, can be decided quickly since the administrative machinery necessary is already in existence. It may well be that the exercise of jurisdiction by this Court will encourage the States of Washington and Oregon to review their refusal to expand the compact and to produce that kind of settlement by agreement which was viewed with approval in *Vermont* v. *New York, supra.* A refusal to exercise jurisdiction would, on the other hand, justify the intransigence of the defendant states and guarantee that no accommodation would ever be offered.

CONCLUSION

Only an exercise of original jurisdiction by this Court can protect the life cycle of the threatened species of anadromous fish. Amici are otherwise powerless to protect their interests. The remedy sought by the State of Idaho will serve the interests of the amici and will not burden the Court with administrative obligations.

For the foregoing reasons it is respectfully submitted that the Motion for Leave to File Complaint be granted.

DATED This 9th day of September, 1975.

Respectfully submitted,

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